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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/056,296	01/24/2002	R. Eric Montgomery	P1083US01	9773

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DISCUS DENTAL, LLC
8550 HIGUERA STREET
CULVER CITY, CA 90232

EXAMINER

JAGOE, DONNA A

ART UNIT	PAPER NUMBER
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1614

MAIL DATE	DELIVERY MODE
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03/02/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/056,296	Applicant(s) MONTGOMERY, R. ERIC	
	Examiner Donna Jagoe	Art Unit 1614	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 February 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 1-5, 7, 11, 12, 16-35, 37-39, 41-43, 45, 46 and 55-60.
 Claim(s) withdrawn from consideration: 61-63.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/Ardin Marschel/
 Supervisory Patent Examiner, Art Unit 1614

/D. J./
 Examiner, Art Unit 1614

Continuation of 3. NOTE: The amendment directed to the capacity for the compound to adhere to the oral tissue or tooth for at least five minutes does not distinguish it from Showa Denko KK who teaches an oral composition selected from toothpaste, chewing gum and troches. It is reasonable for one of ordinary skill in the art to expect that a gum or dentifrice for washing teeth is capable of adhering to the oral tissue or tooth for at least 5 minutes. Applicant has not distinguished the instant invention from the prior art by indication of what agent would be employed to promote adherence for greater than 5 minutes, thus the prior art thickeners would similarly adhere to the dental surfaces.

Continuation of 11. does NOT place the application in condition for allowance because: Regarding applicant's assertion that the rejection of claims 1-5,7,11,12,16-35,37-39,41-43,45,46 and 55-60 is the same as the previous rejection. In response, the rejection is the same because the claims are the same. Regarding the quantity of phosphate material employed in Showa Denko KK, the claim language comprising leaves the claim open for the inclusion of unspecified ingredients, even in major amounts. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Applicant states that the Examiner has ignored the recitation in the prior art that the anticalculus amount "is an at least about amount of the tartar benefit portion, in addition to "from about 0% to about 70% of a dental abrasive" In response, "The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain." *In re Heck*, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. See MPEP § 2123 [R-5]. Applicant's request for reconsideration of the present application with regard to the present objections and/or rejections in light of the amendments to the claims proposed and presented in the after-final amendment has been made. In light of the fact that the proposed amendments to the claims will not be entered into the record for the reasons supra, Applicant's remarks directed to the obviation of these objections and/or rejections as a result of the proposed amendments are not found persuasive. Accordingly, in the absence of any additional remarks or arguments regarding the patentability of the instant claims pending at the time of the final rejection, the Examiner defers to the reasons already set forth in the final rejection dated November 6, 2008. Applicants remarks regarding the priority of the instant claims is noted, however the Examiner maintains that the pH of the provisional application is specifically 8.86. There is no other pH recited therein.

/Ardin Marschel/
Supervisory Patent Examiner, Art Unit 1614